Supreme Court of the United States

OCTOBER TERM, 1942.

No. 451

NORMAN BAKER, PETITIONER AND APPELLANT,

VS.

WALTER A. HUNTER, SUCCESSOR TO ROBERT H. HUDSPETH AS WARDEN OF UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT AND APPELLEE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF.

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WALTER A. HUNTER, SUCCESSOR TO ROBERT H. HUDSPETH AS WARDEN OF UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT AND APPELLEE.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and

To the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Norman Baker, respectfully shows:

I. SUMMARY STATEMENT OF MATTERS INVOLVED.

Petitioner is a prisoner of the United States at Leavenworth, Kansas, under sentence of four years imprisonment imposed by the United States District Court at Little Rock, Arkansas, for violation of 18 U. S. C. A. 338 (use of

the mails to effectuate a scheme to defraud) (*Baker* v. *U. S.*, 115 F. 2d 533) (Certiorari was refused by the United Supreme Court, 31a U. S. 692) and brought this action in habeas corpus in the United States District Court for the District of Kansas.

Respondent was Warden of the United States Penitentiary at Leavenworth to whom Petitioner was committed on March 22, 1941, and by answer denied the allegations of the complaint, but has been succeeded by Walter A. Hunter as such warden.

Trial was had to that court at Kansas City on July 22, 1941 (Rec. 430). Judgment was rendered on October 24, 1941, discharging the writ of habeas corpus and remanding Petitioner to the custody of the Respondent (Rec. 87-89).

Thereafter appeal was duly taken to the United States Circuit Court of Appeals for the Tenth Circuit (Rec. 89) and on the 9th day of July, 1942, that court rendered judgment affirming the judgment of the District Court (Rec. .....).

Thereafter and within the time allowed by rule for petition for rehearing as extended by order of the Court to August 24, 1942 (Rec. .....), Petitioner filed his petition for rehearing.

The Tenth Circuit Court of Appeals entertained the petition for rehearing but denied it on the 2nd day of September, 1942, without opinion (Rec. .....) and this petition for certiorari is filed to obtain a review of the judgment and decision of the Circuit Court of Appeals for the Tenth Circuit, which opinion appears in 129 F. 2d 779.

The petition for the writ of habeas corpus alleged and the findings of the District Court and of the Circuit Court of Appeals or the uncontradicted evidence definitely established the following facts: Upon the trial of the case of *U. S.* v. *Baker et al.*, in the United States District Court which issued the commitment in question

here, at the beginning of the trial, the court ordered the jury segregated during the trial of the case (Rec. 82, last paragraph). Two men unconnected with the marshal's office were selected as bailiffs, sworn, and took charge of the jury as such (Rec. 96 and 413), one by day and one by night. Marshal Pettie engaged quarters for the jury at a nearby hotel and at the close of the Court the first day called the jury together at the hotel and gave them orders not to discuss the case among themselves nor with any third persons (Rec. 402, last ten lines; p. 161, middle of page). He told them that the case was one of unusual importance (Rec. 166, l. 7, p. 173, middle, p. 190, bottom of page). He told them that the government had spent thousands of dollars (Rec. 173) or a large amount of money in preparation for the trial (Rec. 173, ll. 24 to 30; 190, last half of page; 214, first paragraph). He told them that he didn't want "no mistrial" (Rec. 224, ll. 5 to 10; 396, first paragraph; 398, 9th line from the bottom; 402, lower part of page).[1]

During the trial seven deputy marshals, including two refined, educated, and highly entertaining (Rec. 167, l. 34) lady deputies mixed and mingled with the jury freely, taking mail to the jurors' individual rooms and delivering it to them in person (Rec. 276, lower half of page), and socially drinking with the jurors in their hotel rooms.

On two occasions these ladies ate dinner with the jury, talking constantly and making merry during the meal time (Rec. 294, l. 8; 337, ll. 8 to 10) and drinking highballs with them before dinner (Rec. 279, 282, 291). They went to the jurors' quarters after dinner and played poker (penny ante) with jurors (Rec. 283, l. 2; 290; 333; 335). They entertained and visited with the jurors

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[1]"The first time they were in the rooms occupied by Mr. Smith and Mr. Shook, they were talking and we had a little cocktail * * * the ladies were drinking cocktails when I went in" (Rec. 174). This was not denied.

two entire evenings (Rec. 278, 279, 333, 415, 416, 422). On other occasions the ladies were visiting and drinking with the jurors (Rec. 174).

Various deputies, with a bailiff accompanying, took the jurors to church, to a basketball game, to a picture show, and to the zoo (Rec. 83); Deputy Marshal McBurnett, **without the knowledge of the bailiff in charge** (Rec. 347, ll. 15 to 32) took one of the jurors out to the juror's farm by automobile, a trip occupying one and a half hours, during which the juror and Deputy McBurnett were together in his car with **no one else present** (Rec. 360). Deputy marshals also took the jurors to barbershops, stores, hotels, etc. Wives of at least two of the jurors had meals with their husbands at the hotel and the wives of some of the jurors were allowed to telephone to them while the bailiff was in the hearing of the husband but **could not hear what the wife said** (Rec. 343, ll. 2 to 6).

During the trial Bailiff Thompson procured and furnished to some of the jurors, four quarts of whisky (Rec. 148, l. 25; 154, middle of page), and on two or three occasions brought them an additional pint or two of liquor, all for use as a beverage (Rec. 101, l. 20).

The jurors were allowed to purchase whisky *ad libitum* (Rec. 369, l. 14) from the bellboys and porter of the hotel without the presence of the bailiff (Rec. 124, middle of page; 179), getting a pint of whiskey at a time. At least eleven quarts of whisky were consumed by the jury during the two weeks' trial, although it was not shown that any of the jurors became visibly intoxicated.

The opinion of the Court of Appeals implied that the things done by the marshal and his deputies in connection with the jury (drinking whisky, eating, making merry, visiting at their hotel, and playing poker with them), were done as a part of their official duties as marshal and deputies—129 F. 2d 782 (10)—and held they were not prejudicial to Petitioner.

The Circuit Court of Appeals held that Petitioner requested the marshal to take charge of the jury (Op. p. 2)

but there was absolutely no evidence of such a request. The evidence did show that Attorney Isgrig requested the marshal to appoint Deputy Marshal Bradley **as bailiff** to have charge of the jury (Rec. 435), but that Marshal Pettie refused to do so but did place Bradley in charge of the **bailiffs.**

The Court also held that the attendance of the jury at church, basketball game and the zoo, was pursuant to agreement of the parties, but the great preponderance of the evidence is contrary to that holding (Rec. 242, 436, 445).

The Court found and the undisputed evidence showed that one of the jurors upon the trial of Petitioner, was an employe of the United States, being Assistant United States Postmaster at Herbine, Arkansas, and that upon *voir dire* when asked on direct examination by the court and on cross examination by counsel for defendants as to his business or occupation, stated that he was a farmer and merchant and did not disclose but, by his answer, concealed the fact that he was in the employ of the United States as Assistant United States Postmaster. The Circuit Court of Appeals then held that such employment did not render him incompetent to serve as a juror (129 F. 2d 779-783).

The undisputed evidence showed that, upon the trial of the case at Little Rock, Petitioner offered and sought to introduce competent evidence for the expressly limited purpose of showing good faith upon his part (Rec. 452 and 25 to 38), which evidence was vital to his defense. Forty-six witnesses for defendants testified that they had been treated and cured of various ailments which included cancer, at the Baker Hospital. Two Hundred cured patients would have been called, but the Court refused defendants the right to call any more. It was vital to show that defendants believed their treatment would cure cancer (Rec. 51, top of page). Defendants offered to prove by several of these cured patients, that

on coming to the Baker Hospital they gave case histories and diagnoses of their home doctors having no connection with the hospital, who had examined them before going to Baker Hospital which showed they had cancers (Rec. 452 and 25-38), and that these diagnoses and case histories were communicated to defendants and entitled to belief by them (Rec. Same). The Trial Court refused to permit the introduction of that evidence (Rec. 25 to 32). The Circuit Court of Appeals held that the refusal to permit the introduction of competent evidence was a **mere error** of the court which could be reviewed only upon appeal, and that it did not constitute an infringement of Petitioner's constitutional rights (Rec.; 129 F. 2d 783) which would vitiate the sentence.

II. BASIS OF JURISDICTION.

This petition for certiorari is brought under Sec. 240 of the Act of February 13, 1925, and F. C. A., Tit. 28, Sec. 347 (a) and Sec. 463 (c),[2] and the case is a case in a circuit court of appeals within the meaning of Section 347 (a).

III. IMPORTANT FEDERAL QUESTIONS RAISED ARE AS FOLLOWS:

1. Is compliance with the constitutional mandate, requiring that defendant in a criminal case in the United States courts be given a full hearing and a fair trial before an impartial jury, an essential jurisdictional prerequisite to that court's authority to deprive him of his liberty?

1(a). In the trial of a criminal case in the federal court where the jury has been segregated by order of the court and placed in charge of two bailiffs duly sworn

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[2]463 (c) "Sections 346 and 347 of this title applicable. Sections 346 and 347 of this title shall apply to habeas corpus cases in the circuit courts of appeals and in the United States Court of Appeals of the District of Columbia as to other cases therein."

for that purpose, are defendants' constitutional rights infringed or violated by the action of the United States Marshal during the trial in calling the jury together at their hotel quarters in the absence of the defendant and without the knowledge of the defendants or of the court and giving them orders not to discuss the case among themselves or with third persons; telling the jury that the case is one of unusual importance; telling them that the government has expended large amounts of money—thousands of dollars—in preparation for the trial; telling them that the marshal does not want any mistrial of the case? Are such actions of the marshal any part of his official duties as marshal?

1(b). Under the circumstances stated, are defendants' constitutional rights to a fair trial violated and infringed by conduct of deputy marshals, including two entertaining young lady deputies, in mixing and mingling freely with the jurors at their hotel quarters during the trial, eating meals including a birthday dinner and making merry with them, visiting, entertaining, drinking intoxicating liquor and playing poker with them two entire evenings, all without the knowledge or consent of the trial judge or of the defendants or their counsel? Or by the acts of bailiffs and deputies in procuring and allowing the jury to procure and drink, as a beverage, large quantities of intoxicating liquor to-wit: whiskey, the jurors being allowed to communicate freely with bell boys and porters in the absence of the bailiffs? Are such acts part of their official duties as deputy marshals?

1(c). Under such circumstances, are defendants' rights to a fair trial and due process of law violated or infringed by the action of a deputy marshal in taking one of the jurors on an hour and a half trip by automobile to the juror's farm without the knowledge of the bailiff in charge, where the juror was alone with such deputy for the entire trip? Is such conduct part of the official duties of such deputy marshal?

1(d). Under the circumstances stated, are defendants' constitutional rights to a fair trial and to due process violated or infringed by the conduct of the deputy marshals as such accompanying the jury to church, to a picture show, to a basketball game, to the zoo, and to a neighboring army camp, and taking some of the jurors to barbershops, stores and hotels separate from the jury as a whole without the knowledge or consent of defendants?

2. Would the natural tendency of the acts and conduct by employes of the United States, as recited in questions 1 to 1(d), be to consciously or unconsciously produce a mental attitude on the part of jurors favorable to the United States and therefore prejudicial and unfair to the defendants; thereby giving rise to a presumption that defendants' right to a fair trail was impaired or infringed?

3. Was Petitioner deprived of his constitutional right to trial by an impartial jury, by the fact that one of the jurors was an employe of the United States in the very department concerned with the alleged crime, which fact was not disclosed by said juror when cross examined as to his occupation and was not known to the Petitioner or his attorneys until a year after the trial?

4(a). Was Petitioner's constitutional right to a fair trial and a full hearing infringed by the trial court's erroneous refusal to permit Petitioner to introduce competent evidence vital to his defense of good faith?

4(b). Is such a refusal a mere "technical error" within the meaning of Tit. ....., Sec. ....., of F. C. A., or does such infringement by the United States District Court of defendant's constitutional right to a fair trial and a full hearing, vitiate or invalidate a sentence resulting therefrom?

4(c). Where defendants' rights to a fair trial and a full hearing in a criminal case have been infringed by

the trial court's refusal to permit defendant to introduce competent evidence to sustain his defense of good faith, will his right to relief by habeas corpus be defeated by the fact that the erroneous ruling of the trial court may have been subject to review on appeal, especially where on appeal the Circuit Court of Appeals overlooked the purpose to which the evidence was specifically limited and by oversight or neglect, failed to correct such error?

IV. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The Court erred in deciding each of the foregoing questions adversely to Petitioner.

Questions 1(a) to 1(d) and 2 are important questions of federal law which have not been but should be settled by this Court. The Circuit Court of Appeals decided these questions in a way probably in conflict with **applicable** decisions of the Supreme Court. The decision of the Tenth Circuit Court of Appeals has sanctioned such a departure by the lower court from the accepted and usual course of judicial procedure as to call for the exercise of this Court's power of supervision (See cases in Brief Div. I).

Question 3 is an important question of federal law which was broached but not decided by the Supreme Court itself in *U. S.* v. *Wood*, 299 U. S. 123, 81 L. Ed. 78, and should be settled by the Supreme Court.

Question 4(a) is an important question of federal law upon which the Circuit Courts of Appeal are divided and which the Supreme Court should definitely settle (See Cases Brief Div. III).

Question 4(b) was decided by the Circuit Court of Appeals in a way probably in conflict with applicable decisions of this Court and in conflict with its own decisions and decisions of other Circuit Courts of Appeal.

Question 4(c) presents an important question of federal law decided by the Circuit Court of Appeals in a way probably in conflict with applicable decisions of this Court.

Wherefore, Your Petitioner prays that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Tenth Circuit commanding said court to certify and send to This Court a full and complete transcript of the record of the proceedings of said United States Circuit Court of Appeals for the Tenth Circuit had in Cause No. 2475 and entitled on its docket "*Norman Baker, Appellant,* v. *Robert H. Hudspeth, Warden, United States Penitentiary, Leavenworth, Kansas, Appellee,*" to the end that this cause may be reviewed and determined by This Court as provided for by the Statutes of the United States; and that the judgment herein of said United States Circuit Court of Appeals be reversed by This Court, and for such further relief as to this Court may seem proper.

Dated October 1st, 1942.

Norman Baker,
By A. G. BUSH,
Counsel for Petitioner.

A. G. BUSH,
Of Counsel.

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WALTER A. HUNTER, SUCCESSOR TO ROBERT H. HUDSPETH AS WARDEN OF UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT AND APPELLEE.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

(A) OPINION OF LOWER COURT.

The District Court rendered no opinion, but its Findings of Fact and Conclusions of Law appear in the record, page 81. The opinion of the Circuit Court of Appeals is in 129 F. 2d 779.

(B) GROUNDS OF JURISDICTION.

This case is an application for writ of habeas corpus to test the validity of the sentence and commitment under which Petitioner is restrained by the Respondent and is a civil case in the Circuit Court of Appeals within the meaning of Sec. 347 (a) of Tit. 28, F. C. A., and this petition for certiorari is brought under Section 240 of the

Act of February 13, 1925, F. C. A., Tit. 28, Sec. 347 (a) and Sec. 463 (c), which directly makes Sec. 347 applicable to habeas corpus cases in the Circuit Court of Appeals.

(C) STATEMENT OF THE CASE REQUIRED BY RULE 27(d).

This has already been stated in the preceding petition, pages 1-6, which statement is hereby adopted and made a part of this brief (4 Fed. Proc. Forms, p. 529).

(D) SPECIFICATION OF ERRORS.

1(a). The Circuit Court of Appeals erred in holding that it was a part of the marshal's official duty to call the jury together at their hotel quarters in the absence of the defendants and without defendants' knowledge, and to tell the jury that the case was one of unusual importance—to tell them that the government had spent large sums of money—thousands of dollars—in preparation for the trial and to tell them he didn't want "no mistrial" of the case, and in holding that such communications were not prejudicial to the defendants, and did not infringe his constitutional right to a fair trial.

1(b). The Court erred in holding that the acts of the United States deputy marshals in mixing and mingling freely with the jury at their quarters during their segregation, eating meals and making merry with them, drinking intoxicating liquors with them, visiting and playing poker (penny ante) with them two entire evenings, were fair to the defendants on the trial by that jury and that such acts and the extensive use of intoxicating liquor by the jury did not constitute prejudicial misconduct, nor infringe petitioner's constitutional right to a fair trial.

1(c). The Circuit Court of Appeals erred in holding that the burden was on Petitioner to show that the admitted misconduct of the deputy marshals influenced the

jury in favor of the government and against the plaintiff, and in failing to hold that the burden of proof was on the government to show that the jury had **not** been influenced in favor of the government and against the petitioner by the conduct in question.

2. The Court erred in holding that an employe of the United States, employed in the very department with which the alleged crime for which Petitioner was on trial was connected, was competent to serve as a juror in said cause, and that Petitioner's constitutional rights to trial by an impartial jury were not impaired thereby.

3. The Court erred in holding (a) that the erroneous refusal of the trial court to admit competent evidence vital to the defense of Petitioner on trial, was a mere error and could be reviewed only upon appeal; (b) in holding that the rejection of competent evidence vital to his defense did not constitute such an infringement of his constitutional rights as to vitiate a sentence resulting from such trial; (c) in holding that habeas corpus would not lie to redress such refusal, especially where, on appeal, the Circuit Court of Appeals overlooked the fact that such evidence had been offered by Appellant to prove good faith only, a purpose for which it was clearly competent, and failed to correct the error.

(E) SUMMARY OF ARGUMENT.

This case involves infringement of three fundamental constitutional rights, viz.:

1. The right to a fair trial free from improper meddling or tampering with the jury; or the use of intoxicants;

2. The right to trial by an impartial jury;

3. The right to a full hearing.

I. (a) Communications by the United States Marshal to the jury in the absence of defendant. Not even the judge has a right to communicate with the jury regarding the case outside of the courtroom and in the absence of the defendant.

If it would violate fundamental rights for the judge to do so, certainly it would equally violate such rights for the United States Marshal to do so. Furthermore, the marshal had no official duty to communicate with the jury regarding the case. He called the jury together at their quarters at the hotel in the absence of the court and of the defendant and told the jury the case was of unusual importance; he told them the government had spent large sums of money—thousands of dollars—in preparation for the trial and he told them he didn't want a mistrial of the case.

(b) The deputy marshals, including two charming lady deputies, had no more right to mix and mingle with the jury, than if strangers. In fact, as employes of one of the parties, it was more important that they should remain aloof from the jury than that strangers should do so. Their conduct in mingling freely with the jury, delivering mail to individual jurors at their individual rooms and socially visiting and drinking with them there, their conduct in eating meals and making merry with the jurors, conversing constantly with them during and after mealtime, in visiting, drinking intoxicating liquors and playing poker with the jurors during at least two entire

evenings, making themselves a social adjunct of the prosecution, the conduct of one of the deputies in taking a juror on an hour and a half trip to the juror's farm with no one else present and without the knowledge of the bailiff in charge, the conduct of the bailiffs and deputies in furnishing and allowing the jurors to obtain privately from bellboys and porters large quantities of intoxicating liquor (over eleven quarts of whisky) for use as a beverage during the trial, and their conduct in taking the jurors to stores, barbershops and hotels where they had an opportunity to talk with clerks, barbers, and others, and in taking them to a moving picture theater, to a basketball game, to church, to a zoological garden and to an army camp—was so well calculated to build up a friendly attitude toward the government which would necessarily impair the jurors' fairness to the defendant, that it constituted a violation of defendant's fundamental rights to a fair trial.

The marshal and deputies had no more right than a sheriff or his deputies to mix and mingle and talk with the jurors.

Where opportunities to influence the jury are shown to have existed, the burden of proof is cast upon the government to show that no prejudicial influence against the defendants was exerted. The most that can be claimed for the testimony of the government is that it showed that the case was not discussed between the jurors and the deputies, but there is **no denial of the communications of the marshal** to the jury; no showing that the jury was not influenced by the acts and conduct of the deputies, nor that there was not an unconscious influence exerted by the friendly social relations as stated.

It is inconceivable that defendants would not suspect that the jury was influenced by such conduct or that they would not develop an intense distrust of the courts where such conduct is permitted and sanctioned. Such conduct and the free use of intoxicants **would be**

certain to develop suspicion on the part of defendants and would afford ample ground for a corresponding suspicion and distrust on the part of the public at large were such conduct to become known. If the courts are sincere in saying that their proceedings **must be above suspicion,** it would seem that you must promptly and effectively rebuke such conduct.

II. An employe of one of the parties will be presumed to have **an inclination** to favor that party, particularly where his employment is in the very department concerned by the case on trial.

The charge was use of the mails to effectuate a fraud. Juror Goggins was an Assistant Postmaster, employed in the very department of the government with which the alleged crime was concerned. His position would naturally cause a bias against misuse of the mails. His position would naturally give him an influence over the other jurors which might easily act to the prejudice of defendant.

On *voir dire,* on examination by the court and cross-examination by the defendant, he stated that his business was that of storekeeper and farmer, and withheld the fact that he was an Assistant Postmaster, which fact did not come to the knowledge of defendants until a year or more after the trial. He was not an impartial juror. Defendants' constitutional right to trial by an impartial jury was infringed by his employment on such jury.

This Court in the Wood case[3] expressly pointed out that the decision in the Crawford case[4] might be correct as to a postal clerk employed in the very department concerned with the alleged crime, and reserved the point for future decision when an appropriate case should arise. This is an appropriate case and the question should now be settled by you.

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[3]*U. S.* v. *Wood,* 299 U. S. 123.

[4]*Crawford* v. *U. S.,* 212 U. S. 183.

III. The Constitution assures a defendant in a criminal case a full hearing, which includes the right to introduce competent evidence to establish every element of his defense.

On a trial for fraudulent use of the mails, good faith on the part of the defendants is a good defense. Defendant offered and sought to introduce competent evidence to establish his defense of good faith. This evidence was ruled out by the trial court and defendant was not permitted to introduce it, although it had been offered expressly for the limited purpose of showing good faith.

On appeal the Eighth Circuit Court of Appeals held that the evidence was not admissible generally. It implied that it would have been admissible for the limited purpose of showing good faith. It entirely overlooked that portion of the record showing that the evidence in question had been offered **specifically for that very limited purpose of showing good faith.** This was shown conclusively on the hearing in the habeas corpus case in the District Court, but both the District Court and the Circuit Court of Appeals held that the ruling rejecting the evidence in question had been a mere error of the trial court which could be reviewed **only upon appeal** and that such ruling did not vitiate the sentence nor afford ground for relief by habeas corpus.

The rejection of competent evidence to show a vital element of the defense is a violation and infringement of the constitutional right to a full hearing and under well settled rules such a violation justifies relief by habeas corpus. There is a great conflict in the rulings of the various federal courts on this subject as well as upon Points I and II above, and the questions raised by Petitioner should be settled by this Court.

ARGUMENT.

The questions involved in this case are set out in the petition on pages 6 to 9 and for the sake of brevity are not repeated here. The essence of the questions is whether the rule that the violation of fundamental constitutional rights vitiates a verdict and sentence thereby obtained, applies to the right (a) to a fair trial free from improper meddling with the jury and from the use of intoxicants by jurors; (b) to trial by an impartial jury; and (c) to a full hearing.

That obedience by trial courts to constitutional requirements is a prerequisite to the validity of their judgments is now well settled.[6]

The reasons relied on for the allowance of the writ involve the conflict in the decisions and the need of settling the law with reference to constitutional rights as applied to the competency of an assistant postmaster to act as a juror on the trial of a charge of fraudulent use of the mails, and to denial of a full hearing by rejecting competent evidence which defendant offered and sought to introduce to prove a vital element of his defense.

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[5]*Furness W. & Co.* v. *Yang Tsze Ins. Asso.*, 242 U. S. 430, 61 L. Ed. 409-414.

[6]*In re Neilsen*, 131 U. S. 176, 33 L. Ed. 118, 9 S. Ct. 672; *Hudspeth* v. *McDonald*, 120 F. 2d 962; *Lisenba* v. *People of the State of California*, (Dec. 8, 1941) 86 L. Ed. Adv. Op., p. 179; *Brown* v. *Mississippi*, 297 U. S. 278, 80 L. Ed. 682, 56 S. Ct. 461; *Moore* v. *Dempsey*, 261 U. S. 86, 67 L. Ed. 543, 43 S. Ct. 265; *Mooney* v. *Holohan*, 294 U. S. 103, 79 L. Ed. 791, 55 S. Ct. 340, 98 A. L. R. 406; *Chambers* v. *Florida*, 309 U. S. 227, 241, 84 L. Ed. 716, 724, 60 S. Ct. 472; *Glasser* v. *U. S.*, 86 L. Ed. Adv. Op., p. 405 (Jan. 19, 1942); *Johnson* v. *Zerbst*, 304 U. S. 458, 82 L. Ed. 1461, 58 S. C. 1019; *Walker* v. *Johnston*, 312 U. S. 275, 85 L. Ed. 830-836, 61 S. Ct. 574; *Smith* v. *O'Grady*, 312 U. S. 329, 85 L. Ed. 859; *Herndon* v. *Lowry*, 301 U. S. 242, 81 L. Ed. 1066, 57 S. Ct. 732; *Bob White* v. *Texas*, 310 U. S. 530-533, 84 L. Ed. 1343, 60 S. Ct. 1032; *Smith* v. *Texas*, 311 U. S. 128, 61 S. Ct. 164, 85 L. Ed. 84; *Edwards* v. *U. S.*, 312 U. S. 473, 85 L. Ed. 957, 61 S. Ct. 669 (Mar. 3, 1941).

I.

WRONGFUL MEDDLING WITH THE JURY.

The decision of the Circuit Court of Appeals holds that the conduct of the marshal in giving orders and communications to the jury in the absence of defendant, the conduct of the deputy marshals in eating, drinking and making merry with the jurors, in permitting them to obtain intoxicating liquors and in accompanying individual jurors on various trips away from the others, either constituted a part of the official duty of the marshal and his deputies, or was not unfair and prejudicial to Petitioner.

This decision was probably in conflict with applicable decisions of this Court and other Circuit Courts of Appeal, and so far departs from the accepted and usual course of judicial procedure as to call for an exercise of this Court's power of supervision for the following reasons:

The clear weight of authority is that there was no right or duty upon the part of the marshal to give the jury **any** orders regarding their conduct while on the jury, nor any communications about the case. That was a matter for the judge alone.

In *Quercia* v. *U. S.*, 289 U. S. 466, 77 L. Ed. 1321, it is said:

> "In a trial by jury in a federal court, the judge is not a mere moderator, but is **the governor of the trial for the purpose of assuring its proper conduct.** * * * Under the Federal Constitution **the essential prerogatives of the trial judge,** as they were secured by the rules of common law, are maintained in the Federal courts."

Therefore the judge and not the marshal was the one to give instructions.

Furthermore, even the judge had no right to go to the jurors' quarters privately, as the marshal did, and communicate with them as to their conduct or as to the case.

Suppose Judge Trimble, instead of Marshal Pettie, had gone to the jurors' quarters at the hotel after adjournment, and called the jury together in the absence of defendants and their counsel, and had said to the jury, as Marshal Pettie did (Rec. 402), "Gentlemen, you must not discuss this case with each other or anyone else. This is a very important case (Rec. 161). The government has spent a lot of money—thousands of dollars (Rec. 173)—in preparation for this trial (Rec. 190) and I don't want any mistrial" (Rec. 224). Under the prevailing authorities such action on his part would have been error prejudicial to defendants and a violation of their rights to a trial in open court.

In *Parfet* v. *Kansas City Life Ins. Co.*, 128 F. 2d 361, decided only one day before this case was argued, the jury handed the bailiff a written question for the court. The court returned a verbal answer "No" by the bailiff and the Circuit Court of Appeals said:

> "* * * It is error for the court to receive a communication of this kind from the jury and make reply thereto in the form of an additional instruction in the absence of the parties or their attorneys, or without notice and an opportunity to be present, even though substantial prejudice is not affirmatively shown."

In *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76, 63 L. Ed. 853, it is said:

> "We entertain no doubt that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict."

and it was held the trial court had no right to give a supplementary instruction to the jury in the absence of the parties.

In the Fillippon case the court cited with approval several United States cases to the same effect and also many decisions of the state courts collated in the note to *State* v. *Murphy,* 17 L. R. A. (N. S.) 609.

In the Murphy case the judge was informed that the jury desired to communicate with him, went to the door of the juryroom and when the door was opened, stood in the open space and said, "Good evening, gentlemen, I understand you want to see me. Have you agreed?" to which the foreman of the jury replied: "No; I think we cannot agree." Whereupon the judge, after pausing a second, replied. "I will ask you to consider the matter further. Good night."

The North Dakota Supreme Court, after saying that there was no question about the uprightness of the judge's intentions, said:

> "All communications to the jury in reference to the case should be made in open court, and all communications to them in the jury room avoided. * * * * * * It is against the policy of the law to indulge in secret communications or conferences with the jury or with jurors in reference to the merits or law of the case. To determine in each case whether prejudice resulted would be difficult, if not impossible, and justice will be better subserved by avoiding such communications entirely. **The authorities are practically unanimous in condemning such communications,** and in holding them prejudicial as a matter of law."

Quoting from *State* v. *Wroth,* 15 Wash. 621, 47 Pac. 106, the court said:

> "In the discharge of his official duty, the place for the judge is on the bench. * * * The appellant was not obliged to follow the judge to the jury room

in order to protect his legal rights, or to see that the jury was not influenced by the presence of the judge;"

In the note referred to, other cases were cited holding it to be error for the judge to answer a question sent by the jury "without regard to the nature of the communication"; to be "improper though the answer given was correct"; where the judge stepped to the door of the jury room and being asked a question "told the jury he could not answer it but that the point was covered by his charge"; also where the judge went to the jury room and announced that the sheriff would take the jury to supper and "cautioned them as to their conduct while at the meal."

Obviously if **not even a judge** had a right to so communicate with the jury, the United States Marshal had no right to do so.

The conflict in the cases in the note to the *Murphy case,* 17 L. R. A. (N. S.) 609, clearly demonstrates that there is a conflict which should be settled by this Court.

NO STATUTORY DUTY.

No support for the action of the marshal in communicating with the jury as he did, and no support for the actions of the marshal's deputies in eating meals, merrymaking, drinking liquors and playing poker with the jurors can be inferred from the statutes either of the United States or of Arkansas.[7]

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[7]U. S. Code, Tit. 28, Sec. 490, provides: "A marshal shall be appointed in each district," and Section 494 requires every marshal and deputy marshal to take a prescribed oath; Section 503 makes it the duty of the marshal of each district to attend the district courts and to execute all lawful precepts; Section 504 gives the marshals the same powers as sheriffs and their deputies.

The Arkansas laws provide (Pope's Digest of 1937, Sec. 2709): "The sheriffs of the several counties shall be the sheriffs of the several courts" and (Sec. 11822) "shall attend each regular and special term of the county court"; and (Sec. 11823) "shall perform

In *Sutherland* v. *State*, 76 Ark. 487, 89 S. W. 462, it is held that:

> "Where the officer in charge leaves the jury in charge of another **officer not specifically sworn** the purity of the trial is thereby impeached.
>
> "The purity of the trial is impeached *prima facie* by showing that the jury was subjected to such influences, and the burden was at least cast upon the state to show that no prejudice in fact resulted."

MARSHALS ARE NOT BAILIFFS.

The United States statutes recognize a clear distinction between a marshal or deputy marshal and bailiffs sworn to take charge of a jury under U. S. Code, Tit. 28, Sec. 9, and Secs. 595, 596 and 527.

MISCONDUCT OF DEPUTY MARSHALS AND JURORS.

The acts and conduct of the deputy marshals are shown in the statement of the case (Petition pp. 1-6), visiting and drinking with the jurors at their quarters at the hotel, drinking highballs and eating meals and making merry with them at the hotel, entertaining and playing poker with them on two entire evenings at their hotel quarters, the action of deputies and bailiffs in providing or permitting the jurors to obtain large quantites of intoxicating liquor and the action of the jurors in using it, allowing the jurors to communicate with bellboys and porters to obtain such liquors, Deputy Marshal McBurnett taking Juror Shamel by automobile to Shamel's farm involving an hour and a half trip with no one else present,

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all other acts and things required of him by law"; (Sec. 11817) "Each sheriff shall be a conservator of the peace in his county."

The Arkansas laws give the sheriff no authority to instruct, take charge of, or associate with, a segregated jury, and Pope's Digest, Sec. 4024, provides for admonition **by the court**, not by the sheriff.

and the other trips and incidents set out in the statement of facts (Petition pp. 1 to 6). Did these things afford opportunities for improperly influencing the jurors or any of them—did these things have a tendency to influence the minds of the jurors, inclining them either consciously or unconsciously to favor the government?

We do not believe another case can be found where so many instances of improper conduct and such a continuous course of misconduct has occurred, but there is a well established general rule which condemns such acts.

THE GENERAL RULE.

The general rule of law is well established both by the federal and state cases that third persons have no right to mix and mingle with the jury and that any communications from them to the jury regarding the case or any opportunity for such communications will be held to vitiate the verdict and render the trial unfair as to the defeated party, with the possible exception of cases where it is shown affirmatively that the communication had no effect upon the verdict.

This rule is illustrated strongly in *Stone* v. *U. S.*, 113 F. 2d 70, where it was shown that a third person approached one of the jurors and asked him a question. It was not shown that such person was connected with either the government or with the defendant. He may have been entirely disinterested. It was not shown that the question did in fact influence the jury.

The Circuit Court of Appeals quoted from the decision in the Stone case as follows:

> "There is no right more sacred to our institutions of government than the right to a public trial by a fair and impartial jury."

but it failed to note from the Stone case the following:

> "* * * the object of a jury trial would be subverted if they were allowed to communicate with

other persons, or other persons to communicate with them, unless for some purpose of necessity and in the presence of the court.

"* * * * Jurors are human and not always conscious to what extent they are in fact biased or prejudiced and their inward sentiments cannot always be ascertained.

"The improper communication with the juror in the present case **raises the presumption** that the rights of appellants were prejudiced and there is no showing on the part of appellee that no injury could have occurred by reason of the irregularity."

The Stone case follows the decision in *Mattox* v. *U. S.*, 146 U. S. 140-151, 13 S. Ct. 50, 36 L. Ed. 917, where the court said that no ground of suspicion that the administration of justice has been interfered with, will be tolerated. In the Mattox case it is said:

"Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden and invalidate the verdict, at least unless their harmlessness is made to appear."

Many state cases could be cited to the same effect.[8]

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[8]*State* v. *Neville*, 227 Iowa 329, 288 N. W. 83, where one of the lady jurors, simply for convenience, was allowed to ride home with the prosecuting attorney near whom she lived. The evidence showed specifically that there was no mention of the case during any of these rides, but the court said:

"Manifestly, this is not a case of intentional misconduct. It has to do with **unconscious** influence upon jurors as a result of favors from and **social intercourse** with parties, counsel and others connected with litigation. It has to do * * * with public policy and with the effect of such irregularities upon the minds of litigants and the public at large. *Lynch* v. *Kleindolph*, 204 Iowa 762, 764, 216 N. W. 2, 3."

In the Lynch case the court said:

"The question before us is not a question of whether any actual wrong resulted from the association of this defendant with the juror, under the circumstances related, but whether

SHERIFFS AND MARSHALS NOT EXEMPT FROM THIS RULE.

Many cases hold this rule applies to sheriffs and similar officers. In *State* v. *Smith*, 56 S. D. 238, 228 N. W. 240, a conviction was reversed because the sheriff who was not a bailiff in charge went with one of the jurors to put his car in the garage and talked to him for several minutes while on the way to a restaurant for supper, and it was held prejudice would be presumed and the burden was on the state to show that defendant was not prejudiced.

To the same effect is *State* v. *Osler*, 228 N. W. 251.

In *Knight* v. *Inhabitants of Freeport*, 13 Mass. 218, a new trial was granted for such conduct, and the court said:

> "We cannot be too strict in guarding trials by jury from improper influence. This strictness is necessary to give due confidence to parties in the results of their causes; and every one ought to know, that, for any, even the least, intermeddling with jurors, a verdict will always be set aside."

Similar holdings were made in *Shefelker* v. *First Nat. Bank of Marion*, 212 Wis. 659, 250 N. W. 870-872; *Lavalley*

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it created a condition from which **the opposing litigants and the general public might suspect** that wrong resulted from this association. * * *" (p. 332).

In *Comm.* v. *Fisher*, 226 Pa. 189, 75 Atl. 204, 26 L. R. A. (N. S.) 1009, and in *Comm.* v. *Roby*, 12 Pick. 496, it is said:

> "where the jury * * * have had communications not authorized, there, inasmuch as there can be **no certainty that the verdict has not** been improperly influenced, the proper and appropriate mode of correction or relief is by undoing what is thus improperly, and may have been corruptly, done, * * *"

Also:

> "they must be kept entirely aloof and free from contact or communication with other parties than **the bailiffs** who have them in keeping during the trial. * * *"

v. *State*, 188 Wis. 68, 205 N. W. 412, and *Village of Bangor* v. *Hussa C. & P. Co.*, 208 Wis. 191, 242 N. W. 565.

In the Shefelker case the court held that the granting of a new trial under such circumstances was compulsory upon the trial court, and said:

> "the underlying fact back of the ruling in both cases was that **opportunity was presented** for the persons representing the party to exercise an influence, although done **silently or without mention of the case,** upon the action of the juror."

and held that the very fact that a witness who extended the courtesy of a ride to a juror, warned him not to discuss the case, would be calculated to create in his mind a favorable impression of the character of the witness.

In the Lavalley case, during the trial, a juror asked the sheriff if he could ride with him to a dance some ten or twelve miles away. The juror rode in the back seat. The case was not mentioned between them. There was no effort to influence the juror. The court said:

> "It is not in the power of affidavits to show that the two jurors were **not consciously or unconsciously affected by it.** * * * The state is necessarily represented upon the trial of such cases by its officers. * * * the sheriff is charged by statute with the duty of enforcing the law throughout his county. * * * In *Hutchins* v. *State*, 140 Ind. 78, 39 N. E. 243, * * * the deputy prosecuting attorney, * * * spoke to a juror and volunteered to take a message to the latter's family. The court said:
>
> > '* * * Granting that no wrong was intended by either prosecutor or juror, yet the offense committed by both against a fair and impartial trial of the man accused of crime was most reprehensible.'
>
> "* * * The **natural effect** of such conduct is to excite suspicion and to arouse **the gravest apprehensions** on the part of one so on trial, and certainly

> does not inspire confidence in the administration of justice. * * *"

In *State* v. *Ferguson*, 48 S. D. 346, 204 N. W. 652-660, it is said:

> "* * * So delicate are the balances in weighing justice that what might seem trivial under some circumstances would turn the scales to its perversion. Not only the evil, in such cases, but the appearance of evil, if possible, should be avoided."

If cases can be found to the contrary, it only shows a conflict which should be settled by this Court. The decision of the Circuit Court of Appeals is plainly contrary to the Stone and Mattox cases, and to the general rules of law set out in the various state cases cited, and this Court should correct the error of the lower court.

The plain, unescapable fact is that the marshal did give unauthorized communications to the jury. Whether you call them instructions is immaterial. He told them "This is an unusually important case (Petition, Div. I, p. 5, and Rec. 166, l. 7). He told them the government had spent a lot of money—thousands of dollars—in preparing for trial (Rec. 173, ll. 24 to 30). He told them he didn't want a mistrial (Rec. 224, ll. 5 to 10). The equally inescapable fact is that the two charming young ladies and other deputy marshals had **abundant opportunity** to influence the jurors, consciously or unconsciously.

The fact is plain that this conduct mentioned would **certainly create the suspicion** in the minds of defendants and of the public at large that the jury was influenced thereby. It is wholly immaterial whether such influence was conscious or unconscious, whether it was designed as an aid to the prosecution.

It is high time for this Court to put a stop to such practices—to see that the lower courts not only give lip service to the Constitution, but that with heart and soul they make it effective.

This is not a case where the evidence upon the trial of the indictment was all one way. Forty-six witnesses took the stand and testified under oath that they had been treated and cured of the various ailments referred to in the indictment and hundreds more would have done so if the court had not limited the number of witnesses which he would allow defendants to introduce upon that point.

The case was conducted with such bitterness by the prosecuting attorneys that the Eighth Circuit Court of Appeals, in rendering its opinion said: "This outrageous conduct on the part of the government attorney was unethical, highly reprehensible, and merits unqualified condemnation" (115 F. 2d 533-543). In such a case it is obvious that the pleasant social relations carried on by the deputy marshals with the jury might easily turn the scale and constitute an improper factor in causing the minds of the jury to reach a verdict of guilty.

The opinion of the Circuit Court of Appeals is glaringly inconsistent. It says (p. 5) that "the charges of misconduct, if true, would be wholly obnoxious to the fundamental rules of fairness and justice" and then after finding that the major portion of those charges were true, held that it was not shown that the jury was actually influenced thereby.

It says (p. 5) that if it is made to appear that a jury **is exposed** to any matter or thing "which might tend to prejudice or influence their consideration of the case," a "**presumption arises** against impartiality and that presumption can only be rebutted by a clear and positive showing that such matter, thing or behavior did not influence their verdict," citing the Mattox and other cases.[9]

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[9]*Mattox* v. *United States*, 146 U. S. 140; *Stone* v. *United States*, 113 F. 2d 70, 77; *Ray* v. *United States*, 114 F. 2d 508; *Klose* v. *United States*, 49 F. 2d 177; *Lavalley* v. *State*, 205 N. W. 412, 417; *State* v. *Smith*, 228 N. W. 240; *Clements* v. *Commonwealth*, 6 S. W. 2d 483; *Salyers* v. *Commonwealth*, 118 S. W. 2d 208. Annotations in 22 A. L. R. 254, 34 A. L. R. 103 and 62 A. L. R. 1466.

But contradicted that by saying: "It is presumed that the jury will be true to their oath and conscientiously observe the instructions and admonitions of the court."

It erroneously said further:

> "It is the duty of the United States Marshal and his deputies as sworn officers of the court to guard against any outside influences which might pervade the minds of the jurors in arriving at a just verdict, based upon the facts submitted to them by the court" (129 F. 2d 782).

and held "it was therefore not improper but commendable for the marshal to admonish the jury."

The only case cited by the court in support of that doctrine is *U. S.* v. *Ball*, 163 U. S. 662, 41 L. Ed. 300. In that case the jury had been placed in charge of a deputy marshal. The jury had been instructed by the court that they must not separate, must not talk to each other and must not allow themselves to be talked to by any party on the outside about the case. The court said:

> "It would have been according to the more usual and regular practice, to administer a special oath to the officer put in charge of a jury."

but said no objection was made to his taking charge of the jury and the jury were properly cautioned by the court.

The decision of this Court in the Sinclair case[10] indicates clearly how this Court will probably view the acts and conduct of the deputies set out in the petition, pages 1 to 6.

Suppose Sinclair, instead of merely employing detectives to watch the jury secretly and without their knowledge, had employed those detectives to do the things which the deputy marshals did in this case—to visit with the

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[10]*Sinclair* v. *U. S.*, 279 U. S. 749, 73 L. Ed. 946, 49 S. Ct. 471.

jury at their hotel quarters, to drink highballs, to eat meals and make merry with them, to play poker and entertain them two entire evenings—would you have said it is not shown that these things did actually influence the jury and therefore it wasn't contempt of court for him to do that? If this Court condemned Sinclair for doing things which never got to the knowledge of the jury at all, how much more would it have condemned him if he had caused his employes to do the things which the government employes did do in this case.

Surely the defendant in a criminal case in United States courts is as much entitled to a fair trial as the government is, and he needs a fair trial as much or more than the government does.

II.

IS AN EMPLOYE OF THE UNITED STATES, TO-WIT, AN ASSISTANT POSTMASTER, AN IMPARTIAL JUROR WITHIN THE MEANING OF THE CONSTITUTION, UPON TRIAL OF A DEFENDANT CHARGED WITH FRAUDULENT USE OF THE MAILS, SUCH OFFENSE BEING CONCERNED WITH THE VERY DEPARTMENT IN WHICH HE IS EMPLOYED?

The Circuit Court of Appeals (179 F. 2d, p. 783) held that a government employe employed in the very department concerned with the alleged crime, to-wit, Assistant United States Postmaster, was not incompetent to serve as a juror upon the trial of defendants charged with fraudulent use of the mails, thus deciding an important question of federal law which has not been settled by this Court, but was expressly reserved by it in *U. S.* v. *Wood*, 299 U. S. 123, 81 L. Ed. 78, and the decision so far departed from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The findings and the evidence show without dispute that W. L. Goggins, one of the jurors upon the trial of *U. S.* v. *Baker et al.*, was an Assistant Postmaster of the United States; that upon examination by the judge on *voir dire* in January, 1940, he testified that his occupation was that of farmer and storekeeper; that upon cross-examination by counsel for defendants, when asked what his business was, he stated that he was a farmer and storekeeper but withheld his employment as assistant postmaster; that upon taking his deposition on behalf of respondent herein in June, 1941, upon cross-examination by counsel for Petitioner, he disclosed for the first time that he was and had been at the time of the trial, Assistant Postmaster of the United States at Herbine, Arkansas, the postoffice being located in the store which he and his brother carried on, and his brother being Postmaster (Rec. 387).

Thus neither Petitioner nor his counsel had any knowledge that said juror was an employe of the United States until long after the time for filing motion for new trial had expired and Petitioner's only relief was by habeas corpus (Rec. 245).

It is Petitioner's contention that in view of said Goggins being employed in the Postoffice Department, the department concerned with the alleged crime, he cannot be considered impartial as between the parties, and that the decision in *U. S.* v. *Wood*, 299 U. S. 123, 81 L. Ed. 78, while holding that the law permitting employes of the government to sit as jurors in the District of Columbia, if otherwise qualified, did not violate the constitutional provision as to trial by an impartial jury, expressly pointed out that the decision in *Crawford* v. *U. S.*, 212 U. S. 183, 53 L. Ed. 485, might be upheld on the ground that the juror was employed in the Postoffice Department, being a clerk in charge of a subpostal station in his drugstore, and the crime charged was an alleged conspiracy to defraud the government in connection with a contract for furnishing satchels to the Postoffice Department.

In the Wood case the court was divided. The majority opinion said:

> "It will be observed that the employment was in **the very department** to the affairs of which the alleged conspiracy related. But the decision took a broader range and did not rest upon that possible distinction."

This point was not decided in the Wood case. Obviously it is of such importance that this Court should now settle it.

What does "impartial" mean? Webster says it means "Not partial: specifically, not favoring one more than another; treated all alike; unbiased." He defines "partial" as meaning **"Inclined** to favor one party in a cause, or one side of a question, more than the other; biased; predisposed; as, a judge should not be partial."

In the Crawford case the court said what is obviously true, that

> "A jury composed of government employees where the government was a party to the case on trial would not in the least conduce to respect for, or belief in, the fairness of the system of trial by jury. To maintain that system in the respect and affection of the citizens of this country it is requisite that the jurors chosen should not only in fact be fair and impartial, but that they should not occupy such relation to either side as to lead, on that account, **to any doubt** on that subject" (212 U. S. 195).

As Assistant Postmaster, Mr. Goggins must have been familiar with the United States Postal Guide and order of the Postmaster General as to use of the mails. He must have been familiar with the duties of the postmasters to be on guard against any fraudulent use of the mails. He must have come in contact at times with the Postoffice Inspectors who investigated such subjects. He must have felt a sort of proprietary interest in the Postoffice Department and that a certain responsibility

rested upon him to maintain its purity. Furthermore, the other jurors, knowing Mr. Goggins' position as Assistant Postmaster, would naturally give some weight to his views and opinions of the case on account of his official position.

Was he to be considered impartial? Would defendants or the public so consider him? A somewhat vivid light can be thrown upon that question by asking yourselves what any competent attorney for defendant in a mail fraud case would do with reference to allowing a postmaster or an assistant postmaster to sit as a juror, knowing him to be such. We cannot conceive and do not believe Your Honors can conceive that any capable attorney would allow such a juror to go unchallenged, if he knew the facts.

On the other hand, assuming that you were a United States Attorney prosecuting a mail fraud case, and determined to get a conviction, would you not be very glad to have an assistant postmaster or a postal clerk occupy a seat on the jury during that trial?

A further illustration can be gained by reference to other kinds of employment. Suppose an automobile driver were suing a railroad company for damages on account of a collision at a railroad crossing. Would he for a minute allow one employed as an engineer by that railroad, or as a brakeman or as a conductor, to sit as a juror in his case?

Or suppose plaintiff were suing an insurance company upon one of its policies. Would his attorney knowingly permit one of the agents of that company engaged in writing insurance for it, to occupy a place upon the jury? These are but illustrations, but they bring out clearly the principle of the Crawford case and they come within the point reserved in the Wood case. We now ask you to decide that point.

No help can come to Respondent from the statutes of Arkansas. Its Constitution plainly assures the defendant in a criminal case of trial by an impartial jury (Const.,

Art. II, Sec. 10). It needed no statutes to declare that an employe should not be considered incompetent to sit as a juror.

Its laws do provide that certain persons should have the privilege of exemption from jury service. Pope's Digest, Sec. 8344, provides that challenges for cause, should be decided by the court; Section 8341 does not provide what would or would not be cause generally, although the statute does make specific provision as to relatives within the fourth degree (Sec. 8292) and as to witnesses or persons who have formed or expressed an opinion (Sec. 8293). It also provides that "it shall be a ground of peremptory challenge that said juryman is a postmaster."

This was not a privilege granted to the juror. It was a definite, peremptory ground for challenge.

Section 8301, providing that no verdict "shall be voidable because any of the jurymen fail to possess any of the qualifications required in this chapter, nor shall exceptions be taken to any juryman for that cause after he is taken upon the jury and sworn as a juryman," as construed by the Supreme Court is not applicable to cases where, without lack of diligence on defendant's part, knowledge of the juror's disqualification did not come to him until after the trial.

The leading case so holding is *Meyer* v. *State,* 19 Ark. 156, and it is followed by *Lane* v. *State,* 168 Ark. 528, 270 S. W. 974; *Corley* v. *State,* 162 Ark. 178, 257 S. W. 750, and many other cases.

III.

THE CONSTITUTIONAL RIGHT TO A FAIR TRIAL INCLUDES DEFENDANT'S RIGHT TO A FULL HEARING, AND TO INTRODUCE COMPETENT EVIDENCE AS TO EVERY ESSENTIAL ELEMENT OF AN ALLEGED CRIME.

The Tenth Circuit Court of Appeals (129 F. 2d 783) held that the refusal to defendants of a full hearing in a

criminal case and the denial of their right to introduce competent evidence essential to their defense was **not** such a denial of constitutional rights as would entitle defendants to raise the question upon habeas corpus, but that the question was **reviewable solely upon appeal;** also necessarily holding that the fact that upon appeal the Eighth Circuit Court of Appeals overlooked the fact that the evidence in question had been offered and sought to be introduced for a purpose for which it was clearly competent, did not change the rule.

This holding constituted a decision of an important federal question as to which there is much conflict and which has not been but should be settled by this Court.

The refusal to permit the introduction of competent evidence vital to the defense, is a violation and infringement of defendant's constitutional rights to a fair trial.

As said by Daniel Webster and upheld by this Court in the Dartmouth College Case, due process of law means "a law which hears before it condemns."

> "A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken." 12 Amer. Jur. 303.

This was quoted from the opinion of Justice Brandeis in *Akron C. & Y. R. Co.* v. *U. S.,* 261 U. S. 184, 43 S. Ct. 270, 67 L. Ed. 605-614.

In *B. & O. R. Co.* v. *U. S.,* 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797, this Court said in so many words:

> "the due process clause assures a full hearing before the court * * * that includes the right to introduce evidence and have judicial findings based upon it" (p. 1224).

In *Crawford* v. *U. S.,* 212 U. S. 183, 53 L. Ed. 485, 29 S. Ct. 260, the lower court refused defendant the right

to introduce in evidence certain account books to corroborate his testimony that the receipt of certain moneys by him was known to the company in question and the books were not offered as ordinary account books, but "as a written corroboration" of defendant's evidence. The court held the exclusion was error and said "no material and proper evidence on that issue should have been excluded."

The right to introduce evidence as a constitutional right was upheld in *Washington ex rel. Fairchild,* 224 U. S. 510, 56 L. Ed. 863, 32 Ct. 535, and the court said:

> "The carrier must have the right to secure and present evidence material to the issue under investigation."

In *Ga. R. & E. Co.* v. *Decatur,* 295 U. S. 165, 79 L. Ed. 1365-1370, 55 S. Ct. 701, the court said that the refusal to receive proof on the subject "amounts to a denial of a hearing on that issue in contravention of the due process of law clause of the Constitution."

In a very late case on certiorari to the Tenth Circuit Court of Appeals, *Edwards* v. *U. S.,* 312 U. S. 473, 85 L. Ed. 957-963, it is said:

> "The refusal to permit the accused to prove his defense may prove trivial when the facts are developed. * * * The parties must be given an opportunity to plead and prove their contentions. * * * The opportunity to assert rights through pleading and testimony is essential to their successful protection. Infringement of that opportunity is **forbidden.**"

In the late case of *Shepard* v. *U. S.,* 290 U. S. 96, 78 L. Ed. 197, 54 S. Ct. 22, the court reversed a decision of the Tenth Circuit Court of Appeals and held that the admission of a dying declaration against the defendant was not only erroneous but deprived the defendant of a fair trial. If it deprived him of a fair trial, it obviously infringed his constitutional rights.

One of the Supreme Court's latest pronouncements in a habeas corpus case is *Lisenba* v. *People of the State of California,* (Dec. 8, 1941) 86 L. Ed. Adv. Op., p. 179.

> "The fact that the confessions have been **conclusively adjudged** by the decision below to be admissible under state law, notwithstanding the circumstances under which they were made, **does not answer the question whether due process was lacking.**"

Many other cases to the same effect could be cited.

See, also:

Glasser v. *U. S.*, 86 L. Ed. Adv. Op., p. 405 (January 19, 1942).

Mooney v. *Holohan,* 294 U. S. 103, 79 L. Ed. 791, 55 S. Ct. 340, 98 A. L. R. 406.

Johnson v. *Zerbst,* 304 U. S. 458, 82 L. Ed. 1461, 58 S. C. 1019.

Smith v. *O'Grady,* 312 U. S. 329, 85 L. Ed. 859.

The Tenth Circuit Court of Appeals did not attempt to controvert this rule, but both the lower court and the Circuit Court of Appeals refused to consider the evidence bearing upon or showing the refusal by the trial court of this right and disposed of the question by saying that the issue was one which could be reviewed upon appeal only. It held that the court would not consider whether such refusal infringed defendant's constitutional rights in such a way as to vitiate the sentence in question (129 F. 2d 779-783).

The undisputed evidence in the habeas corpus proceeding showed that defendants offered and sought to show that case histories and diagnoses indicated that several patients cured at the Baker Hospital had been afflicted with cancer before going there and that these case histories and diagnoses were communicated to the defendants and that evidence was offered by the defendants for the specific purpose of showing good faith upon their part (Rec. 25 to 38 and 452).

The Eighth Circuit Court of Appeals in its decision implies that the evidence would have been admissible for that purpose, but shows without contradiction that that court overlooked the offer of the evidence having been limited to that specific purpose (115 F. 2d, p. 538) where the court said:

> "The evidence was offered generally and not for any limited purpose. The offer of proof contained no suggestion that the witness had communicated the alleged conversation to the defendants or hospital authorities."

If defendants believed these patients had cancer and were cured at the Baker Hospital, it would support their defense of good faith which was a vital question upon the issue of whether they had formed a scheme to defraud by representing that they had a cure for cancer.

The Tenth Circuit Court of Appeals held that the refusal to permit introduction of such evidence was a mere error which could be corrected only on appeal and was not such a violation of defendant's constitutional rights as to vitiate the sentence (129 F. 2d 783).

A GREAT CONFLICT.

Upon the question of whether such a ruling is **a mere error** or whether it is an infringement of **fundamental constitutional rights** and whether the fact that a question may be or has been reviewed upon appeal bars the right to habeas corpus, there is a great conflict in the decisions of the various courts.

In *Shapiro* v. *King,* 125 F. 2d 890, it was held that the fact that certain contentions had been presented by appellant and **determined adversely** upon appeal from the conviction "does not prevent an application to test the validity of the sentence by habeas corpus," citing *Wong Doo* v. *U. S.,* 265 U. S. 239, 68 L. Ed. 999; *Salinger* v. *Loisel,* 265 U. S. 224, 68 L. Ed. 989.

There were many early decisions that a district court had jurisdiction to determine the sufficiency of an indictment and an error in that respect would be reviewable only on appeal, but this holding is contrary to the later rule where it is now established that a violation of fundamental constitutional rights vitiates a judgment based thereon, and, after appellant has exhausted every available remedy by appeal if it can be said "in the trial fundamental rights were denied him," he may resort to habeas corpus. *Hudspeth* v. *McDonald,* 120 F. 2d 962-965.

This conflict appears even in the decisions of the Tenth Circuit Court of Appeals which in the first part of its opinion in this case broadly states the modern rule as above. Likewise, in *Huntley* v. *Schilder,* 125 F. 2d 250, the Tenth Circuit Court of Appeals, while stating that the sufficiency of an indictment was originally peculiarly within the province of the trial court and his error in respect thereto could be corrected only by appeal, quoted from *Bowen* v. *Johnston,* 306 U. S. 19, 26, 83 L. Ed. 455, saying:

> "It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired."

And the Tenth Circuit Court of Appeals then proceeded to consider and pass upon the sufficiency of the indictment in the Huntley case.

This distinction between mere error and violation of a fundamental constitutional right appears in *Ex parte Nielsen,* 131 U. S. 176, 33 L. Ed. 118-120, where the court said:

> "He was protected by a constitutional provision, securing to him **a fundamental right.** It was not a case of **mere error** in law, but a case of denying to a person a constitutional right, and where such a case appears on the record, the party is entitled to be discharged from imprisonment."

The conflict upon this point is clearly illustrated in *Carey* v. *Brady,* 125 F. 2d 253, where the court declined to write an opinion on the questions involved, because of the conflicting views of its members. In that case the court said:

> "One member of the court is of the opinion that a mere failure of the State Court, upon request, to appoint counsel for an indigent prisoner does not amount to a denial of due process in the absence of other circumstances showing that such appointment is necessary to a fair trial. * * * Another member of the court is of the view that such failure to appoint counsel is a denial of due process that would justify a reversal of the judgment upon appeal, but is not sufficient of itself to destroy the jurisdiction of the court and authorize the release of the prisoner, after sentence, on habeas corpus. The third member of the court is of the opinion that such a failure is of itself a denial of due process that destroys the jurisdiction of the court and entitles the prisoner to release on habeas corpus. Widespread confusion seems also to exist in the minds of judges and lawyers throughout the country with regard to these questions. * * *"

If such confusion exists among three judges of the same circuit court of appeals and if widespread confusion seems to exist in the minds of judges and lawyers throughout the country with regard to these questions, it would certainly be appropriate for the Supreme Court to examine them and settle them.

It is significant that the cases cited by the Tenth Circuit Court of Appeals, when carefully analyzed, do not sustain the rule announced by that court in the case at bar.

The Matter of Moran, 203 U. S. 96-105, is in effect overruled by later cases and is contrary to them.

In *McMicking* v. *Shields,* 238 U. S. 99, there was no allegation that defendant desired to offer additional evidence.

Moore v. *Alderhold,* 108 F. 2d 729, is not in point. There is no holding that the denial of a constitutional right to a full hearing is reviewable only on appeal.

Garrison v. *Hudspeth,* 108 F. 2d 733, is not in point on the question of the denial of a full hearing by rejecting competent evidence. The same is true of *Clarke* v. *Huff,* 119 F. 2d 204.

In *Curtis* v. *Rives,* 123 F. 2d 936, the point was neither proven nor argued.

CONCLUSION.

In conclusion we strenuously and devoutly urge that this Court should determine and settle:

1. Whether the violation or infringement of defendant's consitutional rights during the trial of a criminal case in the United States courts vitiates or invalidates a sentence resulting from such trial;

1(a). Whether defendant's constitutional rights to a fair trial were infringed and violated by unauthorized communications about the case by the United States Marshal to the jury; whether they were infringed by the acts of deputy marshals in visiting, eating, drinking, merry-making and playing poker with the jury and the use of intoxicating liquors, accompanying one or more of the jurors on various trips, and the other acts and conduct set out in the statement of the case on pages 1 to 6 of the petition;

2. Whether defendant's right to an impartial jury was infringed by the inclusion on the jury of an employe of the United States, employed in the very department concerned with the alleged crime for which defendant is on trial;

3. Whether defendant's constitutional rights to a full hearing in a criminal case were violated by the denial

of his right to prove his good faith by introducing evidence which was competent for the purpose of showing good faith, where good faith was an essential element of his defense;

3(a). Whether such a violation is obviated or cured by raising the question upon appeal to the Circuit Court of Appeals, where that court, by oversight as to the undisputed record, holds that the evidence was offered generally and was not offered specifically for the limited purpose for which it was clearly competent.

Respectfully submitted,

A. G. BUSH,
Counsel for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 451

NORMAN BAKER, PETITIONER

v.

WALTER A. HUNTER, SUCCESSOR TO ROBERT H. HUDSPETH AS WARDEN OF UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 455–461) is reported in 129 F. (2d) 779. The findings of fact and conclusions of law by the district court appear at R. 81–87.

JURISDICTION

The judgment of the circuit court of appeals was entered July 9, 1942 (R. 461–462), and a petition for rehearing was denied September 2, 1942

(R. 465). The petition for a writ of certiorari was filed October 9, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Petitioner was convicted for violations of the Mail Fraud Statute. Upon application for a writ of habeas corpus, petitioner sought to obtain his release from custody on the ground that he had been deprived of a fair and impartial trial. Two questions are presented:

1. Whether petitioner was prejudiced by the handling and conduct of the jury, which was segregated during the trial.

2. Whether petitioner was prejudiced by reason of the fact that one of the jurors failed to disclose on his *voir dire* that he was an assistant postmaster and as such attended to the post office in his brother's country store whenever his brother was away.

STATEMENT

On January 25, 1940, petitioner was convicted (R. 68) in the United States District Court for the Eastern District of Arkansas on all seven counts of an indictment (R. 50–68) charging violations of the Mail Fraud Statute (Sec. 215, Criminal Code (18 U. S. C. 338)). He was sentenced generally to imprisonment for four years

and to pay a fine of $4,000 (R. 68–69). The judgment of conviction was affirmed on appeal (115 F. (2d) 533), and this Court denied certiorari (312 U. S. 692; rehearing denied, 312 U. S. 715). On March 22, 1941, petitioner was committed to the United States Penitentiary at Leavenworth, Kansas (R. 69–70).

Ten days later, on April 1, 1941, petitioner filed in the United States District Court for the District of Kansas a petition for a writ of habeas corpus (R. 9–46), challenging the legality of his detention on the ground that he had been deprived of a fair and impartial trial by (1) the handling and conduct of the jury during the fifteen days of the trial, (2) the fact that one of the jurors did not reveal in his *voir dire* examination that he was an assistant United States postmaster, and (3) the trial court's exclusion of certain evidence he sought to introduce as part of his defense. The writ was issued (R. 87), the respondent filed a return (R. 46–70), and a hearing was held (R. 430–454), at which petitioner was present and testified and was represented by counsel (R. 451–452). On the basis of the evidence adduced at the hearing, the trial court made Findings of Fact and Conclusions of Law (R. 81–87) in which all issues were determined in favor of the respondent generally, and ordered the writ discharged (R. 87–89). Upon appeal to the circuit court of appeals, the judgment was affirmed (R. 461–462).

The findings of the trial court (R. 81–86) may be summarized as follows:

On the first day of the trial, which lasted 15 days, the court ordered the jury segregated (R. 139, 200, 221),[1] and two bailiffs were appointed by the marshal and specially sworn to take charge of the jury (R. 339, 413). The marshal made arrangements to house all the members of the jury on the same floor of the Freiderica Hotel (R. 248, 268, 380, 396, 413), the entire floor being reserved for their exclusive use (R. 248, 268, 380, 396). The bailiff in charge of the jury had an office in front of the elevator (R. 139, 140, 172, 190, 249, 254, 268, 306, 325, 340, 362), and his telephone was the only one available to the jurors (R. 268, 322, 367). Meals were furnished by the hotel and paid for by the marshal (R. 269–275, 321, 322–323, 340, 413). Newspapers were inspected and all matter pertaining to the trial eliminated before they were given to members of the jury (R. 119, 137, 218, 249, 275, 362, 414). Mail addressed to jurors was delivered to them by deputy marshals (R. 275, 276, 277, 331).

The court found (R. 83–84) that "on one occasion during the first week of the trial two women deputies in the office of the marshal, together with

[1] Although petitioner does not challenge the sufficiency of the evidence to support the findings, we have added, in parentheses, references to testimony which substantiates them.

the chief deputy marshal, Mr. Bradley, delivered mail to members of the jury at the hotel and accepted an invitation to remain for dinner (R. 141, 144, 168, 277, 306, 331, 414). Following the dinner, they played cards in the bailiff's room with some members of the jury until 9:30 p. m., at which time they left in company of the chief deputy marshal (R. 278–279, 306, 332–333).

"On a later occasion a birthday dinner was arranged for a member of the jury (R. 152, 281–282, 307, 321, 332, 380, 400), which was attended by these two women deputies and by the chief deputy and following which they played cards with some members of the jury until about 10 p. m., at which time they left (R. 114, 125, 151, 191–192, 201–202, 225, 251, 262, 282–283, 307, 321, 332–333, 340–341, 380, 414–415). The women deputies did a few errands at different times for some of the jurors (R. 276, 399). On one occasion a juror, accompanied by a deputy marshal, made a trip to the juror's farm where the juror conferred with his farm manager about cleaning up the farm (R. 309, 312, 359–360). The trip consumed an hour and thirty minutes (R. 359). The jury went to church once (R. 126–127, 234, 261, 349–350, 364, 382, 417) and attended a basket ball game (R. 127, 159, 193, 235, 347–348, 365, 382, 417) in the company of the sworn bailiffs, and on one occasion attended a picture show (R. 158, 193, 417). A sworn bailiff took a juror to get a haircut, one for a shave

(R. 120–121, 135, 160, 180–181, 196, 205, 215–216, 235, 257, 374), and on one occasion the jury with a sworn bailiff and a deputy marshal accompanying them took a drive around the city visiting a zoo and an army camp (R. 155–156, 158, 345–346, 365, 375, 417). Juror Beard's wife visited him briefly and some days later telephoned. The sworn bailiff listened in on both conversations (R. 117, 118, 119, 252; see also, R. 309–310). The wives of jurors Shook and Smith had dinner with their husbands one evening. They ate in a room apart from the dining room occupied by the members of the jury (R. 129, 362)."

The court also found (R. 84) that "there was at no time any extraneous or prejudicial mention or discussion of the case" between the jurors or between any member of the jury and any other person. "The evidence is absolutely and entirely to the effect the case was not discussed with anyone; nor among the jurors themselves until they retired to deliberate upon their verdict (R. 119–120, 128, 130, 136, 163–164, 184, 206–207, 251–252, 265, 280, 283, 308, 316–317, 329, 334, 342, 351–352, 364, 365, 383, 398, 417). There was no corruption, intimidation, coercion, or prejudicial or improper influencing of any member of the jury, and the record is devoid of evidence of any attempt to bring it about."

With reference to petitioner's claim that he was prejudiced by the statement made by the marshal

on the evening of the first day of the trial, the court found that the marshal had "called the jurors together into the bailiff's room and explained to them the nature of their confinement and segregation, and the rules pertaining thereto (R. 161, 173, 190, 214, 223–224, 397, 409), and it is the opinion and finding of the court that in so doing the marshal acted in the exercise of his official duties as marshal in respect to the general conduct, comfort, and welfare of the members of the jury throughout the period of their segregation, and that said conduct of the marshal did in no wise affect the verdict of the jury nor operate to the prejudice of this petitioner."

As to the issue of the use of intoxicants by members of the jury, also raised by petitioner, the court found that "Liquor was procured for the jurors by the bailiff in charge (R. 148, 154, 192, 227, 366–367), and on a few occasions members of the jury procured liquor from a bellboy at the hotel (R. 124, 179, 366–367, 369). The evidence warrants a finding and the court finds that perhaps as many as ten of the fourteen jurors drank a whiskey highball or cocktail on one or more occasions during the fifteen days' confinement (R. 163, 198, 250, 255, 279, 333, 363, 368), and that the total liquor so consumed was in amount from seven to ten quarts. The evidence indicates that a considerable amount of the liquor so consumed was taken by the jurors for medicinal purposes,

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for colds and 'flu and because of the extremely cold weather (R. 162, 183, 192, 197, 374, 377, 382; see also R. 310), and in any event, the use of intoxicating liquor was not excessive (R. 115, 116, 124–125, 128, 131–132, 137, 154, 179–180, 206, 216, 219, 250, 255, 260, 308, 315, 341–342, 343, 365, 368, 376, 377, 382). The drinking of liquor was usually before the evening meal (R. 115, 120, 124–125, 137, 142, 162, 184, 197, 282, 332–333) and only on a few occasions later in the evening (R. 115, 120, 416). No liquor was drunk by any member of the jury during the day (R. 120, 162, 163, 184, 197, 376). There is no evidence to warrant the thought that the verdict of the jury was influenced in any way by such conduct of the jurors and the court finds this petitioner was in no wise prejudiced thereby."

ARGUMENT

I

Petitioner contends (Pet. 6–8, 12–13, 14–16, 19–31) that he was deprived of a fair and impartial trial because: (1) the United States Marshal made a statement to the jurors at the hotel the evening of the first day of the trial; (2) deputy marshals, not sworn as bailiffs, assisted in the segregation of, and were in contact with, the jury; (3) two lady deputies, accompanied by the chief deputy ate dinner with the jury at the hotel on two occasions, and played cards after dinner with some jurors until about 10 p. m. in the bailiff's room at the

hotel; and (4) some of the jurors drank intoxicating liquor in the evenings at the hotel.[2]

1. Petitioner's argument (Pet. 6–7, 12, 14, 19–23, 24–31) that he was prejudiced by the statement the United States Marshal made to the jury at the bailiff's room in the hotel on the evening of the first day of the trial is without merit. The marshal merely explained to the 14 assembled jurors "the nature of their confinement and segregation, and the rules pertaining thereto" (R. 84). As he stated (R. 397, 398):

> * * * I went in the first day after they were taken up, when we knew they were going to be under the rule and I had found from previous experience that it is easier to make one explanation to them at one time than at specific instances than to call each one of the fellows about an infraction. I explained to them this was a case that I didn't have any idea how long they would be locked up; that the newspapers would be censored; that they couldn't read anything about the case and mustn't discuss it with anyone outside or if any one discussed it with them to report it to the court; we didn't want to make it inconvenient for them and that if some necessity arose whereby some of their employees or some of their family wanted to see them they couldn't call their

[2] Petitioner asserted in his petition for writ of habeas corpus (R. 12) that it was not until after his petition for writ of certiorari in the criminal case was denied by this Court that he became aware of these occurrences.

> people up themselves, that we had given orders about the restrictions. You see I did that as a matter of expediency to make it easier on me and our employees later.
>
> * * * * *
>
> * * * I of course, wouldn't call that instructions. I think that is the wrong word. I couldn't instruct them. I recognized that that wasn't my duty except insofar as there were certain restrictions on them I wanted them to understand in the beginning so there wouldn't be any aftermath, so they might understand their duties and not be worrying me about it. I thought it better to tell them that in the beginning.

There was testimony that he also referred to the case as an important one involving considerable expense on both sides (R. 161, 214, 224), but even this merely emphasized the need for strict compliance with the court's order of segregation. Obviously, therefore, as the district judge found (R. 84) this "conduct of the marshal did in no wise affect the verdict of the jury nor operate to the prejudice of this petitioner."

Mattox v. *United States,* 146 U. S. 140, and *Stone* v. *United States,* 113 F. (2d) 70 (C. C. A. 6), upon which petitioner relies (Pet. 24, 25), are not in conflict with the decision below. In the *Mattox* case the conviction of murder was set aside because the bailiff had stated during the trial, within the hearing of jurors, that "This is the third fellow he [the defendant] has killed"; and, while the jury was deliberating, a newspaper

account of the case highly prejudicial to the defendant was read to the jury. In the *Stone* case, the conviction was reversed because a former associate of a defense counsel approached one of the jurors during a recess and asked the juror if he wanted to make some money.

2. The argument that petitioner was prejudiced simply because deputy marshals, not sworn as bailiffs, assisted the duly sworn bailiffs in handling the jury during its segregation, the chief deputy marshal having general supervision of all the officers (Pet. 22–23), is similarly without merit. The district court found (R. 84) that "the presence of deputy United States marshals in attendance upon said jury was in connection with their official duties in handling and safeguarding the jury pursuant to the orders of the court directing the segregation and custody of said jury." According to the testimony of the United States Marshal (R. 409), virtually all of his deputies were kept busy on the one case "watching things." Moreover, it was not contradicted that it was at the request of one of petitioner's trial counsel, "Fred Isgrig, who was a former District Attorney" that the chief deputy, in whom Isgrig had a lot of confidence, was placed in charge of the jury by the United States Marshal (R. 397–398, 405, 435). In view of the affirmative evidence as to the extreme care taken to protect the jury from improper outside influences (R. 83–84),

it is clear that the mere failure to administer a special oath to all of the deputies can not be said to have prejudiced petitioner. See *United States* v. *Ball*, 163 U. S. 662, 674.

3. Petitioner complains further of the fact that intoxicating liquor was available to the jurors, either through the bailiffs or the bell boys at the hotel (Pet. 3, 4, 7, 12, 14–15, 23). But the findings of the district court, *supra*, completely remove any doubt as to whether petitioner was thereby prejudiced. The liquor was used in the evening, at the hotel, but never in excessive amounts, and in some cases medicinally, with fruit juice, for colds and "flu." None was taken during the day; and there is no evidence suggesting that any juror was at any time even slightly intoxicated.

4. Petitioner attempts to make much of the fact that two lady deputy marshals had dinner with the jury on two occasions at the hotel and played cards with the jurors on each occasion until about 10 p. m. (Pet. 3–4, 7, 12, 14–15, 23, 28). But nothing in the record justifies his claim of prejudice. As the court below aptly said (R. 460), only "ugly and ill-founded insinuations can be drawn from the association of the jurors with the lady Deputies." Indeed, if the mere presence of the deputies was sufficient to deprive petitioner of a fair and impartial trial, as he seems to contend (Pet. 14, 15, 23, 24, 28), it is difficult to under-

stand why throughout his petition he attempts to create the impression that these lady deputies exceeded the bounds of propriety and provided the jurors with entertainment, "making themselves a social adjunct of the prosecution" (Pet. 15). The chief deputy marshal as well as the bailiff on duty was also present on each of these occasions. And nowhere in the record is there a scintilla of evidence that these ladies engaged in any improper conduct. Indeed, all of the testimony was to the effect that their conduct was above reproach. Furthermore, it is significant, we believe, that they were invited to these dinners by the jurors, and the jurors, not the Government, paid for their meals (R. 168–169, 277, 281, 287, 331–332, 400).

5. Finally, petitioner argues that he was prejudiced by the fact that jurors were taken to church, to a basketball game, to a show, and to the zoo; that one was taken to his farm for about an hour and a half; several to the barber shop, etc. (Pet. 4, 7–8, 15–16, 23–31). But on all of these trips the jurors were accompanied by officers of the court, and all the testimony was that at no time was the case discussed or the jurors subjected to any improper outside influences. As for petitioner's argument that it must be inferred this treatment prejudiced him by ingratiating the deputies—employees of the Government—with the jurors, it should be observed that the record shows the jurors were irked by their close confinement

(R. 314, 398), and juror Shamel, in particular, resented having a deputy accompany him on the visit to his farm, considering it an imposition (R. 309).

We think it is plain that petitioner greatly exaggerates the effect of the occurrences of which he complains. He failed utterly to establish the allegations of his petition, as required (*Johnson* v. *Zerbst,* 304 U. S. 458, 468; *Walker* v. *Johnston,* 312 U. S. 275, 286), and the prejudicial inferences he draws from the incidents in question are completely dispelled by affirmative evidence to the contrary. The record impels the conclusion that the handling and conduct of the jury in no way deprived him of a fair and impartial trial.

II

Petitioner contends that he was deprived of a fair and impartial trial because one of the jurors, on his *voir dire,* gave as his occupation "farmer and merchant" and failed to state that he was an assistant United States postmaster (Pet. 5, 8, 13, 31–35). There is no merit in this contention.

Juror Goggans, on his *voir dire,* when asked his occupation, responded "farmer and merchant" (R. 453–454), but in his deposition, taken in June 1941, he testified as follows (R. 387):

> Q. What is your business Mr. Goggans?
> A. Farming is, I count that my business. My brother and I are partners. We have

this business, we have three thousand acres of land and I look after the farm and he looks after the store. However, I look after the store some when I am out here and if I am away he takes my place.

* * * * *

Q. You say when you are out, your brother attends to the store mostly?

A. Yes.

Q. You attend to the farming?

A. Yes.

Q. When your brother is away do you attend to the store part of the time?

A. Yes.

Q. Your brother is also Post Master?

A. Yes.

Q. When he is away, do you attend to the Post Office?

A. Yes, sir. I am Assistant Post Master.

Q. You were at the time of this trial?

A. Yes.

Q. How long have you been Assistant Post Master?

A. Since 1920.

The mere fact that Goggans was a government employee would not, of course, have disqualified him. *United States* v. *Wood,* 299 U. S. 123. But petitioner argues that this is an exceptional case, inasmuch as Goggans was an employee of the government department specially interested in the prosecution, and contends that in the *Wood* case this Court expressly excepted such cases from its

decision. But even as to such exceptional cases, the Court there said (*id.*, at 150), "The law permits full inquiry as to actual bias in any such instances," thus indicating that actual bias is the true test. And in the instant case, even after learning that Goggans was an assistant postmaster, petitioner made no effort to ascertain if there was any basis for a charge of actual bias. Moreover, if, as this Court further indicated, *ibid.*, it would not be sensible to impute bias as a matter of law "to all storeowners and householders in cases of larceny or burglary," certainly an assistant postmaster, whose employment appears to have been only a casual or part-time one, necessitated by the business arrangement between him and his brother, could not be challenged for cause merely because the case in which he was summoned involved the use of the mails to effect a scheme to defraud.[3]

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[3] Petitioner's contention (Pet. 5–6, 8–9, 13, 17, 35–42) that he was denied a full and fair hearing by the convicting court's refusal to permit the introduction of certain evidence tendered to prove good faith on his part, is untenable. As the court below pointed out (R. 461), "error in the admission or rejection of evidence in the trial of a case does not destroy the jurisdiction and it is not reviewable on habeas corpus." The record indicates, moreover, that this point was presented to the court which affirmed petitioner's conviction in the assignments of error (R. 25–30), and that if, as petitioner contends (Pet. 17, 38–39), the court overlooked the point involved—i. e., that the evidence was offered to prove good faith on the defendant's part—this oversight was pointedly called to the court's attention in a petition for rehearing

CONCLUSION

The decision below is correct, and the petition presents neither any question of importance nor conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
OSCAR A. PROVOST,
ANDREW F. OEHMANN,
Attorneys.

NOVEMBER 1942.

(R. 30–33, Index, p. 2), which was denied. Finally, the question was fully presented to this Court in a petition for a writ of certiorari (R. 34–40, Index, p. 2), which was also denied. 312 U. S. 692. Clearly, therefore, no further consideration of the question is warranted.

U. S. GOVERNMENT PRINTING OFFICE: 1942

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 451.

NORMAN BAKER, PETITIONER,

VS.

WALTER A. HUNTER, SUCCESSOR TO ROBERT H. HUDSPETH AS WARDEN OF UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

A. G. BUSH,
Attorney for Petitioner.

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PETITIONER'S REPLY BRIEF.

THREE QUESTIONS SUBMITTED.

Respondent's brief (p. 2) states that two questions are presented by Petitioner. We ask you not to overlook the third point, viz.: the constitutional right to a full hearing (Petitioner's Brief p. 35).

Respondent's brief seems concerned chiefly with minimizing and glossing over the facts shown by the undisputed evidence upon which Petitioner relies.

It appears from *Hollins* v. *State,* 295 U. S. 39, 79 L. Ed. 500, that this Court, even upon petition for certiorari in a habeas corpus case, will examine the evidence where the undisputed evidence is alleged to establish violations of the Constitution.

In that case the Petitioner challenged the jury panel upon the ground that negroes had long been excluded from jury service on account of their race or color, thus depriving Petitioner of his constitutional right to equal protection of the law. The court said:

> "From its examination of the evidence, the court is of the opinion that the case calls for the application of the principles declared in *Neal* v. *Delaware,* 103 U. S. 370."

I.

Meddling with Jury.

The opinion of the lower court omitted any reference to the lady deputies drinking highballs with the jurors on the occasion of their visits to the jurors' quarters. We assume that both the lower court and counsel for Respondent either overlooked or gallantly ignored the facts testified to by the ladies themselves in that respect.

Counsel for the government in argument and the lower court in its opinion make no distinction between sociability, entertainment, personal influence, or even poker playing and drinking at a card club, country club or other social function where such things may be considered proper and highly desirable, and social mingling with a jury segregated by order of the court, eating meals with them with continuous conversation during mealtime and while visiting at their rooms drinking highballs and playing penny ante poker with them.

In the former case, such things are commonly considered forms of conviviality which are highly desirable in building up and cementing lasting friendships.

In the latter case, the very purpose of segregation is to remove the possibility of friendly or other influences being exerted upon jurors to win their favor or friendship or in any way disturb the delicate balance of the scales of justice.

Petitioner makes no insinuation that the conduct either of the lady deputies or other deputies would have been in any degree improper in a social circle composed of the jurors as individuals.

We emphatically contend that it was grossly improper when related to jurors while acting in their capacity as jurors and segregated under order of court.

In stating that "it was not contradicted that it was at the request of one of Petitioner's trial counsel (Fred Isgrig) that the chief deputy was placed in charge of the jury," counsel for the government misinterpreted the testimony of Fred Isgrig himself who said he meant and asked merely to have Bradley appointed *as bailiff* to take charge of the jury (Rec. 435, last question and answer).

II.

Juror Goggins Employed by the United States.

This Court has recognized that no juror would be likely to admit prejudice after a verdict of conviction had been rendered by him against a defendant.

No one could testify to the juror's state of mind. In fact, there might be a predisposition to find for the government, of which the juror himself was entirely unconscious.

The question here is not whether Petitioner was prejudiced by the answer which Juror Goggins gave on *voir dire*, as suggested by counsel for the Respondent. The question is whether Juror Goggins' relation to the very department of the government concerned with the crime

for which Petitioner was convicted was likely to influence him in favor of the government and therefore against the defendant by reason of his official position in the postal service.

The Crawford and Wood cases[1] reserved this question for future decision by the Court. Occasion for that decision has now arisen and we submit the question should now be decided by you.

III.

Constitutional Right to a Full Defense.

Respondent's brief urges that this Court's denial of certiorari in *Baker* v. *U. S.*, 312 U. S. 692, was an adjudication as to the alleged error of the trial court in refusing to permit Petitioner to introduce competent evidence essential to his defense.

This Court has definitely said that the refusal to grant a writ of certiorari is not an adjudication of any question involved in the application for the writ and "imparts no expression of opinion upon the merit of the case, as the Bar has been told many times."

U. S. v. *Carver*, 260 U. S. 842.
Atlantic Coast Line v. *Powe*, 283 U. S. 401.

That due process of law requires that the defendant in a criminal case have an opportunity to present every available defense has been definitely held by this Court many times.

Moore Ice Cream Co. v. *Rose*, 289 U. S. 373.
American Surety Co. v. *Baldwin*, 287 U. S. 156.
York v. *Texas*, 137 U. S. 15, 34 L. Ed. 604.[2]

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[1]*Crawford* v. *U. S.*, 212 U. S. 183, 53 L. Ed. 415; *U. S.* v. *Wood*, 299 U. S. 123, 81 L. Ed. 78.

[2]For discussion of the conflict in the cases on this point and the difference between a mere error and a constitutional right, see Petitioner's supporting brief, page 39.

In conclusion we ask:

Is the Constitution binding on the trial courts of the United States?—Yes.

Is this court the final arbiter of constitutional questions? —Yes.

Will you now determine whether petitioner had a constitutional right to an uninfluenced jury, to impartial jurors, to introduce admittedly competent evidence essential to his defense?

We submit that the answer should be "YES."

Respectfully,

A. G. BUSH,

Attorney for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1942.

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VS.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

PETITION FOR REHEARING WITH BRIEF IN SUPPORT THEREOF.

A. G. BUSH,
Davenport, Iowa,
Attorney for Petitioner.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

PETITION FOR REHEARING.

To the Honorable, the Supreme Court of the United States and the Justices Thereof:

Comes now Norman Baker, Petitioner in the above entitled cause, and presents this his petition for rehearing of the above entitled cause in which his petition for certiorari was denied without opinion on the 16th day of November, 1942, and in support thereof respectfully shows:

That on or about the 16th of November, 1942, this Court denied the petition for certiorari herein and thereby denied Petitioner the protection of his constitutional

rights to a fair trial by a jury free from interference and influence of third persons.

This Court failed to give due consideration to the public importance of the questions presented in said petition and particularly to the effect of establishing as law the rulings of the Tenth Circuit Court of Appeals regarding the duties of marshals and deputy marshals and their communications and associations with a segregated jury.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that the judgment of the Circuit Court of Appeals for the Tenth Circuit be upon further consideration reversed.

Respectfully submitted,

A. G. BUSH,
Counsel for Petitioner.

Certificate of Counsel.

I, A. G. Bush, counsel for the above named Norman Baker, do hereby certify that the foregoing Petition for Rehearing of this cause, is presented in good faith and not for delay.

A. G. BUSH,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR REHEARING.

Petitioner cannot ascertain the Court's reasons for denying his petition for certiorari, and is therefore at a serious disadvantage.

We assume the Court thought the questions here involved were not of much importance to the public but were questions which affected only the Petitioner. We believe the Court must have failed to give due consideration to the effect of the decision of the lower court.

If that decision stands, it establishes as law, at least in the Tenth Circuit, that where a jury is segregated by order of the court and placed in charge of bailiffs specially sworn, it is part of the official duties of marshals and deputies, without the knowledge of the judge or defendants' attorneys, to direct the jurors as to their duties; to tell them when a case is one of unusual importance; to tell them when the government has spent large amounts of money in preparing for trial; to warn them against bribery; and to tell them that he does not want any disagreement.

It implies that it is a function of the marshal and his deputies to mingle socially with such segregated jurors at their quarters; to eat meals with them and talk constantly with them while so doing; to drink highballs with them; to play cards with them; to entertain them by arranging a birthday celebration with place cards to be read by each juror; by making trifling presents to the juror whose birthday is being celebrated, accompanied by short speeches—and to relieve the tedium of jury service by pleasant sociability.

It abolishes the common law rule followed by courts generally that a presumption of prejudice arises from

communications and associations of unauthorized third persons with a segregated jury.

If such is the law of the Tenth Circuit, it is contrary to the law in the Eighth Circuit. *Stone* v. *U. S.*, 113 F. 2d 70, where the court said:

> "The object of a jury trial would be subverted if they were allowed to communicate with other persons, or other persons to communicate with them, unless for some purpose of necessity and in the presence of the court.
>
> "Jurors are human and not always conscious to what extent they are in fact biased or prejudiced.
>
> "The *improper communication with the juror* * * * *raises the presumption* that the rights of appellant were prejudiced."

If such is the law in the Tenth Circuit, it violates and is contrary to the principles on which jurors are segregated. Plainly they are segregated for the very purpose of preventing them from mingling and communicating with the parties, the witnesses or third persons generally, including officials other than the sworn bailiffs in whose custody they are placed.

If such is the law of the Tenth Circuit, it is contrary to the law of Arkansas. *Sutherland* v. *State*, 76 Ark. 487, 89 S. W. 462, where the officer in charge of the jury left the jury in charge of another officer not specifically sworn.

It is contrary to the law of South Dakota, *State* v. *Smith*, 56 S. D. 238, 228 N. W. 240, where the court said:

> "He was not a bailiff and his official capacity as sheriff certainly gave him no right or authority to mingle in any fashion with the jurors or to have anything whatever to do with them."

To the same effect is *State* v. *Osler*, 56 S. D. 264, 228 N. W. 251, where it was said:

> "The sheriff was not sworn in as a bailiff and had of course no right whatever to mingle with the jury in any way."

If such is the rule of the Tenth Circuit, it is contrary to the law of Wisconsin (*Shefelker* v. *First National Bank of Marion*, 212 Wis. 659, 250 N. W. 870; *LaValley* v. *State*, 188 Wis. 68, 205 N. W. 412, and *Village of Bangor* v. *Hussa Company*, 208 Wis. 191, 242 N. W. 565).

It is contrary to the law of Pennsylvania and of Massachusetts. *Com.* v. *Fisher*, 226 Pa. 189, 75 Atl. 204, which quotes from *Com.* v. *Roby*, 12 Pick. 496, saying:

> "Where the jury have had communications unauthorized there, inasmuch as there can be no certainty that the verdict has not been improperly influenced, the proper and appropriate mode of correction or relief is by undoing what has thus improperly and may have been corruptly done."

Also:

> "They must be kept entirely aloof and free from contact or communication with other parties than the bailiffs who have them in keeping during the trial."

Neither at common law nor by statute of the United States or of the State of Arkansas are marshals given any official duty to perform any services for a segregated jury except such as the court directs.

In the case at bar, the court directed the marshal to procure quarters for the jury, but there is no evidence whatever and no claim has been made either on the part of the government or on the part of the marshal himself that the court gave him any instructions to tell the jury what their duties were or to give them any warning or orders to refrain from associating with third persons. The judge himself gave them their orders at every adjournment in that respect, as his duty required (Rec. 223).

Neither is there any claim by the marshal or by counsel for the government that the court ordered or required

the marshal or his deputies to visit with the jurors socially at their quarters, to eat with them, to converse constantly during the meals, to entertain them with presents, place cards and presentation speeches, to accompany them to their quarters after meals and drink intoxicating liquors with them and play cards with them during the evening, or that the court even knew of such doings.

The only argument which either counsel for the government or for the Tenth Circuit Court of Appeals made in justification of such conduct was that petitioner did not introduce any evidence to show that the jurors were in fact influenced by that conduct to render a verdict against him.

What could be more obvious than that the friendly communications and associations shown by the law-enforcing officers of the government would have a natural tendency to breed a feeling of favor for the government they represented. The marshal and his deputies are indisputably law-enforcing officers of the government.

As said in the *Stone case, supra:*

> "Jurors are human and not always conscious to what extent they are in fact biased."

What possible way was open to Petitioner to demonstrate that the jurors were biased in favor of the government by the conduct in question other than the natural inferences or presumptions that as a matter of common knowledge, attend all human relations?

Friendliness breeds friendliness just as surely as enmity breeds enmity. The friendly social relations, acts and communications were shown without dispute.

The law itself closes the mouths of the jurors as to matters which inhere in their verdict. By settled rules they could not testify whether their minds were influenced by the kindly associations and ministrations of the deputies. VIII Wigmore on Evidence (3d Ed.), Sec. 2349, p. 668, where it is said:

"The verdict as uttered is the sole embodiment of the jury's act, and must stand as such without regard to the motives or beliefs which have led up to their act.

"A juror cannot impeach his verdict."

Also Sec. 2350, p. 678; *State* v. *Lindeman*, _____ N. D. ____, 254 N. W. 276, 93 A. L. R. 1442, and Annotation, 93 A. L. R. 1449.

The government's contention and the finding of the Tenth Circuit Court of Appeals that during the entire two evenings of the meals and the card games and during the other associations during the two weeks of the trial, no conversation was had with reference to the case which the jury was then trying, obviously does not go far enough to show that the kindly ministrations and communications of the deputies did not produce the favorable attitude on the part of the jurors toward the government, which such kindly acts, conduct and communications naturally would produce.

This Court can take judicial knowledge of human nature and of psychology. We submit that every one of you is familiar with countless instances in actual life where kindly acts and social contacts have produced a friendly attitude toward the actors and either the conscious or unconscious desire to favor the actors.

We ask you to consider these facts in reverse. Assume that employes of the defendant arranged a birthday party for one of the jurors with presents, entertaining place cards and short speeches, assume that these employes had eaten at least two meals with the jurors and conversed with them constantly during the meals; assume that they had gone to the jurors' quarters after the meals and joined them in drinking highballs either before or after the meals during the entire evening.

In the light of the Sinclair case,[1] what would have been your judgment in a case where such conduct on the

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[1]*Sinclair* v. *U. S.*, 279 U. S. 749, 73 L. Ed. 939, 49 S. Ct. 471.

part of defendants' employes had resulted in their being convicted and sentenced to imprisonment for contempt of court?

If it would have been contempt of court for defendants' employes to do these things which the government's employes did do, it must have been contempt of court for the government's employes to do them, unless they had some official duty.

Most important of all is the fact that if such is the law of the Tenth Circuit, it is *contrary to the settled principles relating to segregation of jurors and to fair trials.*

In your decisions you have stressed the importance of maintaining the jury system on a plane which would prevent suspicion on the part of the defendants or on the part of the public as to the fairness of a trial.

In the Mattox case[2] it is said:

> "It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of *suspicion* that the administration of justice has been interfered with *be tolerated.*"

Also:

> "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are *absolutely* forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear."

The court referred to the Knapp case[3] where it was held that the mere presence of an officer during the deliberations of the jury absolutely vitiates the verdict without regard to whether any improper influences were actually exerted over the jury or not.

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[2]*Mattox* v. *U. S.*, 146 U. S. 140, 36 L. Ed. 917-921.

[3]*People* v. *Knapp*, 42 Mich. 65.

In the *Sinclair case, supra,* the court said:

> "The test, therefore, is the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty."

Also:

> "The situation is controlled by the reasonable tendencies of the acts done."

Also:

> "Here again not the influence upon the mind of the particular judge is the criterion, but the reasonable tendency of the acts done to influence or bring about the baleful result is the test. * * * The wrong depends upon the tendency of the acts to accomplish this result without reference to the consideration of how far they may have been influenced in a particular case."

In *Betts* v. *Brady,* 86 L. Ed. (Adv. Sheets), page 1116, the court said:

> "The 14th Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right."

and while the court affirmed the sentence in that case, a strong dissenting opinion by Mr. Justice Black, concurred in by Mr. Justice Douglas and Mr. Justice Murphy, quoted the statement just made and held that defendants' trial had been offensive to those fundamental ideals. To paraphrase Mr. Justice Black's quotation from the Supreme Court of Wisconsin, would it not be a mockery to secure to a defendant solemn constitutional guaranties for a full and fair trial and yet subject a segregated jury to the inevitable influence of social contracts with employes of the government during the trial of the case—eating, drinking, playing cards and conversing continuously.

In *U. S.* v. *Dressley,* 112 F. 2d 972, certain finger print cards were offered in evidence and the jury allowed

to take them to its room. On the back of the cards was contained the "criminal history" of the defendant. It was not shown that the jury considered or read or even saw the criminal history in question, but the judgment of conviction was set aside and the court said:

> "On the basis of the record before us, it is impossible to say that the jury was not substantially influenced by the information which was improperly before it."

So, in the case at bar, it is impossible for you to say that the jury was not influenced by the flagrant violation of the legal principles which forbid association of third persons with a segregated jury, except for the purposes of necessity and with the knowledge and consent of the court, both of which were totally lacking here.

What would the public think as to the fairness of a trial in which employes of one of the parties were allowed to mingle and communicate with a segregated jury and eat and drink and play cards with them as shown in this case?

The lower court, with a commendable desire to retain public respect for jury trials and to protect the lady and other deputies, failed to mention the ladies' drinking highballs with the jurors and minimized the extent of their sociability. But we contend that the constitutional rights of defendant to liberty are more important than to shield the marshal and his deputies from just criticism.

The facts are shown without contradiction. The ladies by their own testimony did engage in drinking highballs (Rec. 282, 333, 335, and see Bradley, Rec. 422). At least one of the jurors understood that the marshal's communications to them were designed to warn them against bribery (Rec. 223). What could be more prejudicial than to instill into the minds of the jurors the thought that defendants might try to bribe them? The thought of bribery was the very thing that vitiated the verdict in the Stone case( ).

Would all these things increase or destroy public belief in the fairness of the trial? If you took a Gallup poll on this subject, ninety-nine per cent of the votes would be that such things were unfair.

Is it possible that any defendant in a criminal case would fail to suspect that the results of the conduct shown would be to create friendliness and bias toward the government with the consequent unfavorable tendency toward the defendant?

If you yourselves were the defendants, or the attorneys for the defendants, would you consent to deputy marshals' eating, drinking, playing cards and mingling and communicating freely with a segregated jury for hours at a time?

If you were a party or attorney for one of the parties, even in a civil case, would you believe you had had a fair trial if an intelligent, competent lady secretary, bookkeeper or other employe of the other party had been allowed to mingle with the segregated jury and converse with them for hours at a time or if any of the employes of the other party had been allowed to so mingle with the jury, to eat, drink, play cards and make merry with them?

We use the term "make merry" deliberately and advisedly. What is the purpose of drinking highballs socially except merry making? What is the purpose of a birthday dinner party with humorous place cards, humorous presents and brief presentation speeches except merry making? (Rec. 337.)

We disclaim any thought that the things done in connection with this jury would have been improper at a wedding or a night club or any social party, but we do contend most emphatically that they were entirely improper when done in connection with a segregated jury and we believe upon deliberate consideration, if time will permit you to deliberate, your conscience will compel you to agree with us.

What place have such things in the deliberations of a jury to determine whether to deprive a fellow citizen of his liberty for a long term?

If you persist in your denial of certiorari in this case, you open a wide door to the deliberate, intentional wide spread use by the prosecution of a half dozen or more deputy marshals as social adjuncts of the prosecution.

That some prosecuting attorneys will be eager to use such influences is clearly shown by what prosecuting attorneys have done in the past, as illustrated in Cain's "Sensational Prosecutions and Reversals," 7 Notre Dame Lawyer 1.

Moreover, even though a prosecuting attorney were too ethical to sanction such conduct, still the marshal and his deputies are law enforcing officers of the government. In many cases they are instrumental in bringing the defendants to trial and *desire* a conviction. Your denial of certiorari certainly opens a way for them to exercise a secret influence, unrecognized even by the jurors themselves, but none the less potent. That the danger of such conduct is *not imaginary* is shown by the many cases of such misconduct cited in the annotation to *Emmert* v. *Ohio*, 90 A. L. R. 243-252.

It may be that the court regarded this as an isolated case and that there would be no probability of a recurrence of deputies' eating, talking constantly, drinking liquor and playing cards with jurors, but we ask the Court to notice the undisputed testimony of Deputy Mallett herself who said that with reference to the Baker jury "her practice did not differ only in this respect—I didn't see as much of them—wasn't with them as much as I am usually" (Rec. 284).

Referring to the meals eaten with the jurors she said, "I tried to be pleasant" (Rec. 293).

Also:

"Q. Did you talk with the jury any?
A. Constantly.

Q. They talked to you constantly?

A. Yes, sir I would not have had dinner with them if they hadn't" (Rec. 284).

Also, she said she was under the impression that she had a perfect right to wait on the jury and visit with them and that it was her duty and practice to do so.

"Q. That has been your practice with all other juries?

A. Yes, sir" (Rec. 298).

Sooner or later this Court will have to define the duties of marshals and their deputies with relation to segregated juries. The present case is a proper one in which to determine whether the duties of the marshal and his deputies are limited to providing room and board and other necessaries for the jury, or whether they extend to wholly unnecessary communications and associations calculated to relieve the lonesomeness of the jurors and the monotony of service on a segregated jury—associations and communications which this court has definitely forbidden to third persons generally.

The enlarged scope of habeas corpus is well set out in *Coates* v. *Lawrence*, 46 F. Supp. 414-420, where the court said:

> "At common law an officer's return to a writ of habeas corpus showing that the prisoner was held under final process based upon a judgment or decree of a court of competent jurisdiction closed the inquiry. So it was in this country under the judiciary act of February 5, 1867, Ch. 28, 14 Stat. 385, now embodied in 28 U. S. C. A., Sec. 453, extended the writ to all cases of persons 'in custody in violation of the Constitution or of a law or treaty of the United States.' * * * 'Habeas corpus cuts through all forms and goes to the very tissue of the structure.' "

We submit that, having shown unauthorized acts and conduct by the deputies, the natural effect of which

would be to bias the jurors in favor of the government, Petitioner has gone as far as reason requires and as far as the rules of evidence regarding the testimony of jurors permit.

If such acts and conduct deprived him of a fair trial, they violated his constitutional rights to due process of law which demands a fair trial and the case comes squarely within the provisions of Title 28, Section 451; that "the Supreme Court and the district courts shall have power to issue writs of habeas corpus" and Section 453 which provides that the writ of habeas corpus shall extend to a prisoner in jail if "he is in custody in violation of the Constitution," and the Court shall dispose of him as reason and justice require.

We respectfully submit that reason and justice require that the sentence and commitment of Petitioner be voided to the end that he may have a new trial in which his constitutional rights will be duly guarded.

Respectfully submitted,

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